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CENTER



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Bureau of Justice Assistance  
U.S. Department of Justice



**ÆQUITAS**  
THE PROSECUTORS' RESOURCE  
ON VIOLENCE AGAINST WOMEN

**NCCD**

National Council on  
Crime & Delinquency

# **TRIAL STRATEGIES FOR THE PROSECUTION OF SEXUAL ABUSE IN CONFINEMENT**

Christopher Mallios • AEquitas

May 14, 2013

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# National PREA Resource Center

The National PREA Resource Center (PRC) was established through a cooperative agreement between the Bureau of Justice Assistance and the National Council on Crime & Delinquency (NCCD). The mission of the PRC is to assist adult prisons and jails, juvenile facilities, lockups, community corrections, and tribal facilities in their efforts to eliminate sexual abuse by increasing their capacity for prevention, detection, monitoring, responses to incidents, and services to victims and their families

# AEquitas: The Prosecutors' Resource on Violence Against Women

AEquitas' mission is to improve the quality of justice in sexual violence, intimate partner violence, stalking, and human trafficking cases by developing, evaluating, and refining prosecution practices that increase victim safety and offender accountability

# Presenter

## **Christopher Mallios, Attorney Advisor, AEquitas**



# Ombudsman Call

*This call and accompanying fact pattern contain graphic language and descriptions and was created in connection with prosecutor training on sexual abuse in confinement. The names and incidents in this fact pattern are fictitious.*

# Learning Objectives

## **At the end of this webinar, participants will be better able to:**

- Develop trial themes and strategies throughout your opening statement, case-in-chief, cross-examination, and closing argument
- Support and work with victims who recant or do not want to participate in the criminal justice process
- Overcome challenges, including jury bias and defenses



# Definition: Sexual Abuse

“Sexual abuse” refers to “contact between the penis and the vulva or anus; contact between the mouth and the penis, vulva, or anus; penetration of the anal or genital opening; and “[a]ny other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of any person that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire”

28 CFR § 115.6, Definitions related to sexual abuse,  
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>, p. 96

# Statement of Sherry Sullivan (continued)

I have been an inmate at the South Brockland Women's Correctional Facility since November 11, 2012. I got picked up for possession of cocaine and I was just waiting for a trial or something. I am waiting to get released -- maybe this summer. One of the supervising officers on my block was Thomas Anderson. At first, he didn't bother me. But then I started working in the laundry, and he would be transporting a few of us down there every day, Monday through Friday.

# Statement of Sherry Sullivan (continued)

After just a few days in the laundry, that's when it started. He started pulling me out into a room off to the side and raping me. It was like a closet, but bigger. It had a table in there that looked like it was an old table from a doctor's office. Sometimes he did it twice a day. It was always the same thing, except a couple of times. He always used a condom, turned me over and put me face down so I was bending over on a table, and then he put his penis in my vagina from behind.

# Statement of Sherry Sullivan (continued)

The first time he said something like, “If you know what is good for you, and you want me to take care of you and protect you in here, you will do this,” or something like that. Honestly, I was so scared, I didn’t say a word. I would cry a lot in the beginning. He just ignored it. Sometimes he would give me some food or stuff or cigarettes before or after.

# Statement of Sherry Sullivan (continued)

I never said a word to anyone. I really just thought that he could kill me in there so I didn't say anything. I never told anyone. A few of the girls would give me dirty looks, not just in the laundry but like in the cafeteria too, but no one said anything to me. I wasn't going to report this. I just couldn't keep it in anymore. I do not want to press charges. I just thought about him being transferred and that he is going to do this to someone else somewhere, and I just don't want what happened to me to happen to anyone else.

# If this case came across my desk, I would:

- A. Take it to grand jury
- B. Request additional investigation
- C. Call the victim immediately
- D. Other

# Offender-Focused Prosecution

- Offenders purposefully, knowingly, and intentionally target victims whom they believe they can successfully assault
- Keep the focus on the actions, behaviors, characteristics, and intent of the offender

# The Context of the Victim

## **The victim's context is defined by:**

- The offender (influence on the truth, relationship, etc.)
- The culture (barriers, disclosure, access to service, etc.)
- The self (blame, prior history and experience)
- The audience



# Trial Preparation

Sherry Sullivan is transported to the prosecutor's office for a trial prep session. Sherry says she doesn't want to talk about the rapes; she just wants the prosecutor to talk to her about what will happen during the trial. The prosecutor spends 45 minutes talking about the process. Sherry says she will talk to the prosecutor another time prior to trial.

28 CFR §§ 115.43, 115.68, 115.368 Protective custody,  
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>,  
p. 50; 28 CFR § 115.67 Agency protection against retaliation, p. 102

# STATE v. Thomas Anderson

“Hi it’s Sherry Sullivan from the Anderson case. I am calling because I just ... I want this whole thing dropped. I want the charges dropped. I just cannot do this. Please just tell me what I have to do to get the case dropped. If I have to sign something or what.”

# STATE v. Thomas Anderson

The prosecutor calls the prison and asks the PREA coordinator to relay a confidential message to Sherry:

“Hello Sherry, I would like to talk about your message. I am here to support you and I just want to talk to you to make sure you are OK. I am here to support you. I will see you tomorrow in court. Please call me back.”

# What should the prosecutor do on Monday?

- A. Tell the defense attorney that the victim does not want to testify
- B. Tell the victim she has to testify
- C. Proceed without the victim's testimony
- D. None of the above

# STATE v. Thomas Anderson

On Monday morning, the victim comes to court and tells the prosecutor that the rape never happened.

# What should the prosecutor do?

- A. Conduct a victim interview
- B. Drop the case
- C. Have a victim-witness advocate speak to victim
- D. Tell her to think about it and call back in a few days

# Discovery

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

Standard 3-3.11, ABA Criminal Justice Section Standards

# Discovery

(b) A prosecutor should not fail to make a reasonable diligent effort to comply with a legally proper discovery request.

(c) A Prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

Standard 3-3.11, ABA Criminal Justice Section Standards



# Why recant?

For many victims, recanting is an attempt to stop the criminal case from moving forward and stop cooperating with the investigation or prosecution.

# Victim Dynamics

## **Why do so many victims fail to cooperate with criminal prosecution?**

- Trauma
- Mistrust or the criminal justice system
- Embarrassment/shame
- Being treated with suspicion
- Lack of support
- Put the incident behind them
- Intimidation

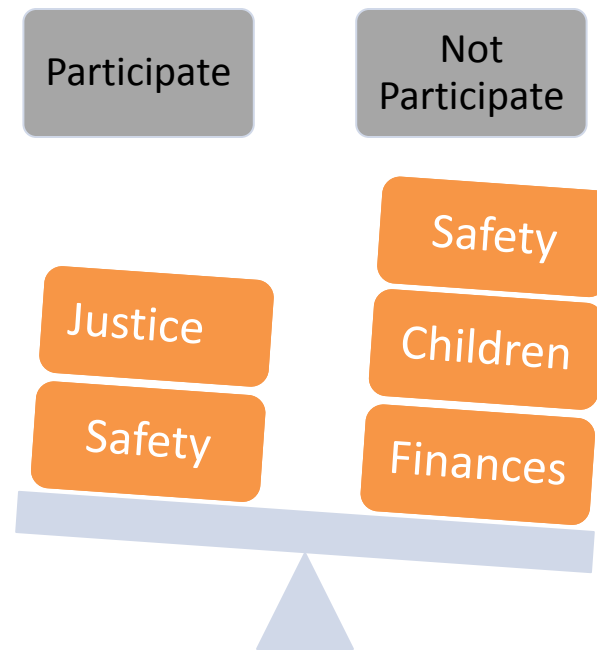
# Decisions

Safety risks, cultural barriers, and consideration of life changing, unintended consequences are serious concerns for victims in whether to cooperate with a criminal prosecution against their offender.

These decisions are also serious concerns for the criminal justice system, as prosecutions are often dismissed when victims fail to appear for trial.

# Complex Decision

Responsibility is not just to understand these dynamics:



We need to appreciate that perpetrators master and exploit them to circumvent the justice system and community efforts.

# Criminal Justice System

Beliefs → Response

# Rape Myths

“Despite considerable research and publications in professional and popular journals concerning rape, such myths continue to persist in common law reasoning”

Sarah Ben-David & Ofra Schneider, Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance, 53 (5/6) SEX ROLES 385 (Sept. 2005)

# Question

**Assume that the victim recants to the prosecutor and then admits that the recantation was a lie.**

- Can the prosecutor be called as a witness?
- What argument would you make in requesting that the subpoena be quashed?

# Lawyer as Witness

“A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a **necessary** witness.”

Rule 3.7(a). Model Rules of Professional Conduct.



# Trial



# How we proceed

# 2-Step Charging Process

1. Assuming the victim's version is 100% true, do the allegations constitute rape?
2. Can you prove the victim's allegations?

# Corroboration

## **Consider other evidence**

- 911 tapes/Calls to reporting hotline
- Medical records
- 404(b) evidence
- Photographs
- Behaviors, appearance, and demeanor of all parties
- Any requests for cell/other transfer while in prison

# Factors to Consider

- Corroboration
- Motive
  - Consequence of making the disclosure
  - Intimidation
- Timing
- Level of detail
- Plausibility

# The Crawford Effect

Must consider the effect of *Crawford v. Washington*, 541 U.S. 36 (2004) on your ability to prove the case.

# Voir Dire

- What behaviors would you like to address in voir dire?
- What questions do you think would reveal juror bias?

**STRATEGIES**  
*The Prosecutors' Newsletter on Violence Against Women*  
ÆQUITAS Issue # 2 • July 2010



**Educating Juries in Sexual Assault Cases**  
**Part I: Using Voir Dire to Eliminate Jury Bias**  
By Christopher Mallios, JD and Toolsi Meisner, JD<sup>1</sup>

Crimes of sexual violence continue to be misunderstood even though there has been significant research surrounding the dynamics of sexual assault and its impact on victims during the last three decades.<sup>2</sup> We now understand much more about these crimes, the people who commit them, and the way victims respond to trauma. Unfortunately, we cannot assume that the results of this research have infiltrated the minds of the average layperson, juror, or judge.

Too many people still believe the outdated and disproved mythology that surrounds sexual violence.<sup>3</sup> Rape myths shift the blame for the crime from the rapist to the victim.<sup>4</sup> When a fact-finder in a sexual assault case accepts a rape myth as true, the prosecutor faces tremendous barriers to achieving justice for victims and holding offenders accountable for their crimes.

This article is the first in a series that will explain strategies to educate juries about sexual violence facts and overcome common misconceptions. In addition to providing data-driven information about sexual assault

based on research, journal articles, and authoritative publications, this article will suggest ideas to improve jury selection techniques. Future articles in this series will provide additional material to provide prosecutors with information and strategies to educate, dispel common misconceptions, and convey the truth to fact finders through other aspects of trial practice, including opening statements, direct examination, calling expert witnesses, and closing arguments.<sup>5</sup>

To be effective in prosecuting crimes of sexual violence, prosecutors must understand the research and statistics about sexual assault in order to educate judges and juries about sexual assault dynamics and common victim responses. Although much of the data in this area is not generally admissible in a criminal case, prosecutors can benefit from a thorough understanding of the dynamics of sexual assault because it will aid them when devising trial strategies, anticipating defenses, preparing victims, and developing effective cross-examinations and arguments.

# Closing

## **Theme:**

- Who is the defendant?
- Why and how did he select the victim?
- How did he carry out the crime?
- How did he injure her?
- Why is she to be believed (ie, how can you assess her credibility so that you know she is telling you the truth)?



# Opening

- Should the prosecutor address the victim's behavior in his/her opening?
- How can the prosecutor address this behavior without putting the focus on the victim?

# Witness Order

## **Potential Witnesses:**

- Victim
- Corrections officers assigned to her block
- Corrections official who can explain victim's/defendant's schedule
- Corrections official who can explain map of facility and D's access to victim
- Expert testimony on victim behavior
- Medical testimony
- Prompt complaint witness
- Law enforcement

# Direct Examination

- Should prosecutors address victim behaviors through their direct examination of the victim?
- What are the pros and cons of asking victims to explain their behaviors?

# Victim Behavior

## **May be addressed**

- In voir dire
- By the victim
- Through an argument
- Through an expert
- Through a combination

# Direct Examination of the Victim

# Victim Behavior

## **Most common reactions judged to be counterintuitive:**

- Earnest resistance
  - Not screaming, not yelling, not shouting “no” during the rape, not fighting back, etc.
- Delayed or piecemeal reporting
- Continued contact with the offender
- Subsequent sexual activity

# Victim Responses

## **Victim's judgment of her behavior influences reaction:**

- I should have...
- I shouldn't have...
- Why did I...
- Why didn't I...

# Trauma

## What Causes Trauma

- Extreme fear or terror
- Betrayal
- Blitz or surprise assaults
- Blame and shame
- Disastrous disclosures or reports
- Lack of support

## Effects of Long Term Traumatic Stress

- Anxiety and vigilance
- Anger, resentment, and conflict
- Uncertainty about future
- Prolonged mourning of losses
- Diminished problem solving
- Isolation
- Health Problems
- Physical and mental exhaustion
- Changed world view



# Expert Testimony on Victim Behavior

## Purpose

- Provides jurors with specialized information about a range of victim behavior
- Provides a proper context in which to evaluate a victim's behavior
- Not trying to match victim behavior to a "typical" or "real" victim
- Not using an expert to opine on the victim's reasons for a specific behavior
- Lay a foundation for closing arguments based on factual evidence about how victims behave
- Counter defense arguments the victim behaviors support an inference that the victim is lying

# Introducing Expert Testimony

- Identify the behavior that you think will cause a jury to disbelieve the victim
- Decide whether to call an expert
  - Admissible?
  - Available?
  - Pros and cons
- Explain the behavior

# Case Law

“[T]he behavioral characteristics or behavioral patterns of an alleged victim in a sexual abuse case may need to be explained by expert testimony, especially where that behavior would seem to be counterintuitive.”

*U.S. v. Pagel*, 45 M.J. 64, 68 (CAAF 1996)

# The Danger Zone

## **An expert CANNOT:**

- Testify about a particular witness's credibility
  - Cannot be a human lie detector
- Testify as to whether an assault did or did not happen

# Combating Defense

It never happened

It wasn't me

# Closing Argument

Offender-focused

Credibility – statements with the ring of truth

Detail

Demeanor

Interest

Common sense

Corroboration

# Summary

- Cases involving sexual assault in confinement will require focused and collaborative investigative and victim-centered resources
- Focus on the offender's behavior and how he selected this particular victim
- Look for corroboration from a variety of sources
- Carefully prepare to try the case in anticipation of issues related to recantation or non-participation

# Additional Resources

- U.S. Department of Justice National PREA Standards  
[http://www.ojp.usdoj.gov/programs/pdfs/prea\\_final\\_rule.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf)
- STRATEGIES Newsletter, Prosecuting Cases of Sexual Abuse in Confinement, Issue #  
<http://www.aequitasresource.org/library.cfm>
- The Prosecutors' Resources  
<http://www.aequitasresource.org/library.cfm>
- Voices for Justice: Surviving Prison Rape, produced by Just Detention International  
<https://www.youtube.com/watch?v=0bOQet07OIg>



# Questions?



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THE PROSECUTORS' RESOURCE  
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# For More Information

For more information about the **National PREA Resource Center**, visit [www.prearesourcecenter.org](http://www.prearesourcecenter.org). Direct questions to [info@prearesourcecenter.org](mailto:info@prearesourcecenter.org)

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